EXHIBIT C

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United States District Court, D. Connecticut.

UNITED STATES OF AMERICA ex rel. David J. Capella, Plaintiff,
v.
UNITED TECHNOLOGIES CORPORATION, Norden Systems, Inc., and NSI, Inc., f/k/a Norden Systems, Inc., Defendants.

No. 3:94-CV-2063 (EBB).

June 3, 1999.

RULING ON MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

BURNS, Senior J.

*1 This ruling addresses the question of whether relator David Capella's *qui tam* action brought on behalf of the United States under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33 (1998) is barred for lack of subject matter jurisdiction because it constitutes a "parasitic suit" based on an earlier filed action. On June 14, 1994, Walter Drake brought a *qui tam* action against United Technologies Corporation ("UTC") and Norden Systems, Inc. ("Norden") under the FCA, alleging that the defendants filed false claims with the government and made false statements to receive payments for depreciation costs on fixed assets (the *"Drake"* action). Approximately six months later, Capella brought this action against UTC, Norden, and NSI, Inc., [FN1] claiming that UTC and its subsidiaries presented false claims to the government to recover insurance costs and made false statements in connection with the recoupment of such costs. Pursuant to Federal Rule of Civil Procedure 12(b)(1) and the "first to file" jurisdictional bars in 31 U.S.C. §§ 3730(b)(5) and 3730(e)(3), the defendants move to dismiss this case on the ground that it duplicates the *Drake* action and would subject the defendants to a double recovery for the same alleged wrongdoing. For the following reasons, the defendants' motion to dismiss for lack of subject matter jurisdiction [Doc. No. 59] is granted in part and denied in part with the specific conditions set forth herein.

FN1. In 1994, UTC changed the name of Norden to NSI, Inc. Because most of the events complained of took place prior to the name change, the Court will refer to the company as Norden (as the parties have in their briefs).

BACKGROUND

I. *Government Defense Contracts*

Defendants UTC and Norden, a subsidiary of UTC, provide goods and services to the United States government pursuant to defense contracts. The government allows defense contractors such as UTC and Norden to charge it not only for the cost of labor and materials incurred on government contracts, but also for a portion of their general overhead and other types of costs attributable to government contracts ("indirect costs"). (Pl.'s Second Am. Compl. ¶ 8.) Insurance costs and fixed asset depreciation costs represent two types of indirect costs that may be recovered.

The government also permits UTC and Norden to "progress bill" their work on defense contracts, including the indirect costs incurred on such contracts, to obtain partial payment before completion of the required work. (*Id.* ¶ 14.) To facilitate payment of indirect costs, the defendants typically negotiate "annual indirect cost forward pricing rates" with the government at the beginning of each year based upon estimated overhead costs. (*Id.* ¶ 15; Defs.' Mem. Supp. at 20.) This eventually leads to an agreement on an overall rate for a pool of indirect costs, not on each component of a contractor's indirect costs. While UTC and Norden account for their insurance costs and depreciation costs separately, they do not submit progress bills or invoices to the government with separate line items for each component of indirect costs. (Defs.' Mem. Supp. at 20.) Instead, they recover indirect costs on progress bills under fixed price contracts by billing an amount equal to direct costs, such as labor and materials, multiplied by the agreed-upon indirect billing rate. (*Id.*) Government auditors may review the negotiated indirect cost forward pricing rates after the end of the year in light of actual costs. (Pl.'s Second Am. Compl. ¶ 16.)

***2** The Truth in Negotiations Act ("TINA") requires contractors to disclose accurate and complete contract pricing information to the government during the course of contract negotiations. *See* 10 U.S.C. § 2306a. TINA and federal regulations also require contractors to file several types of documents with the government, which completely and accurately explain their cost accounting practices ("CAPs") used to calculate indirect costs chargeable to the government. (Pl.'s Second Am. Compl. ¶¶ 9-10, 12, 17-19.) In addition, contractors must disclose any proposed material changes in their CAPs, provide a cost impact statement estimating the effects of such changes, and obtain government approval before billing for indirect costs resulting from such changes. (*Id.* ¶ 11.) Further, contractors must certify that they are in compliance with TINA, government cost accounting standards ("CAS"), the provisions in their government contracts, and their CAPs disclosed to the government. (*Id.* ¶¶ 7, 9-10, 12-13, 17-19.) Documents that must be filed in connection with these requirements include the contracts themselves, periodic progress bills, CAS disclosure statements, and Certificates of Indirect Costs. (*Id.* ¶ 9-10, 12, 17-19.) From 1987 to 1994, all of UTC's and Norden's government contracts and progress bills contained these certifications of compliance. (*Id.* ¶¶ 20-21.) During these same dates, the defendants submitted to the government CAS disclosure statements and Certificates of Indirect Costs relating to proposals for indirect cost forward pricing rates and final settlements of indirect costs. (*Id.* ¶¶ 22-24.)

II. *The Capella Action*

On December 5, 1994, David Capella, a former employee in Norden's audit department, brought this action on behalf of the United States under the *qui tam* provisions of the FCA. Pursuant to 31 U.S.C. § 3730(b)(4)(B), the government declined to formally intervene and the Court subsequently unsealed the case. In essence, Capella accuses UTC and Norden of submitting false claims and statements to the government seeking payments for unallowable costs of insurance chargeable as indirect costs. He contends that the defendants made false statements and certifications in CAS disclosure statements, defense contracts, Certificates of Indirect Costs, and progress bills that they did not maintain any self-insurance programs, (*id.* ¶¶ 26, 28-29, 36, 48-50), when in fact they utilized self-insurance for many risks including automobile insurance, environmental pollution insurance, workers compensation insurance, comprehensive general liability insurance, and health and welfare benefits insurance. (*Id.* ¶¶ 45, 47.) In addition, the relator maintains that the defendants failed to disclose to the government that they purchased certain types of insurance through UTC's "captive" insurance companies, such as aircraft products liability and property insurance and group reinsurance. (*Id.* ¶ 46.)

***3** Capella alleges that he apprised members of management at UTC and Norden that the insurance information and progress bills submitted to the government for payment of insurance costs were false. (*Id.* ¶¶ 39, 43.) However, neither company took any action to correct the problem or to inform the government of the inaccuracies. (*Id.* ¶¶ 40-41, 44, 48, 57-60.) Capella maintains that, absent the defendants' false statements and certifications, the defendants would not have been entitled to receive payments for indirect insurance costs. (*Id.* ¶¶ 52, 57.) The Complaint sets forth the following five paraphrased claims for relief:

(1) From 1987 to 1994, UTC presented to the government periodic progress bills on its contracts and Certificates of Indirect Costs, each of which contained false claims; made false statements in CAS disclosure statements, contracts, and reports to get false claims paid or approved by the government; and knowingly caused its subsidiaries to do the same, in violation of 31 U.S.C. §§ 3730(a)(1) and (a)(2).

(2) From 1987 to 1994, UTC made false statements in progress bills, Certificates of Indirect Costs, CAS disclosure statements, contracts, and reports to conceal, avoid, or decrease its obligation to pay monies to the

government; and knowingly caused its subsidiaries to do the same, in violation of 31 U.S.C. §§ 3730(a)(2) and (a)(7).

(3) From 1987 to 1994, Norden presented to the government periodic progress bills on UTC's contracts and Certificates of Indirect Costs, each of which contained false claims; and made false statements in CAS disclosure statements, contracts, and reports to get false claims paid or approved by the government, in violation of 31 U.S.C. §§ 3730(a)(1) and (a)(2).

(4) From 1987 to 1994, Norden made false statements in progress bills, Certificates of Indirect Costs, CAS disclosure statements, contracts, and reports to conceal, avoid, or decrease its obligation to pay monies to the government, in violation of 31 U.S.C. §§ 3730(a)(2) and (a)(7).

(5) As of May 1990, UTC knowingly conspired with Norden and its other subsidiaries to defraud the government by sending false information for inclusion in its subsidiaries' CAS disclosure statements and other certifications to the government, by refusing to correct such information when brought to UTC's attention, and by instructing management to continue such practices in violation of 31 U.S.C. § 3729(a)(3).

(*Id.* at 23-27.)

On behalf of the United States, Capella seeks to recover actual damages, treble damages, and civil statutory penalties for each false statement made to get a claim paid or approved by the government pursuant to 31 U.S.C. § 3729(a). The relator also seeks a statutory relator's share of the award under 31 U.S.C. § 3730(d)(2). Finally, Capella seeks reimbursement of attorney's fees and costs pursuant to this section. (*Id.* at 28.)

III. *The Drake Action*

Approximately six months before Capella filed suit, Walter Drake brought a *qui tam* action under the FCA against UTC and Norden currently pending in this Court. *See United States ex rel. Drake v. Norden Sys., Inc.*, No. 3:94CV963(EBB) (D.Conn.1994). Drake was a former supervisor in Norden's finance department with responsibility for maintaining compliance with fixed asset capitalization requirements. The same attorney represents Capella and Drake in their respective suits. As in *Capella,* the government declined to intervene in *Drake.* Drake alleges that Norden failed to comply with federal regulations and UTC's Financial Manual, which govern the identification and monitoring of the physical location and value of its fixed assets. Moreover, Drake contends that Norden filed false claims in progress bills and Certificates of Indirect Costs, and made false statements in CAS disclosure statements, contracts, and reports for the purpose of recovering from the government the cost of depreciation of fixed assets as indirect costs. (*Id.* ¶¶ 60-65.)

***4** In particular, Drake charges Norden with: (1) implementing an improper accounting practice to conceal its write-off of approximately $27.5 million of fixed assets, without disclosing the practice or submitting a cost impact statement to the government, (*id.* ¶¶ 35-41); (2) wrongfully including in its list of fixed assets at least one (and possibly as many as three) MilVax I computer(s) and component(s), (*id.* ¶ 45); (3) improperly charging the cost of developing product lines to Independent Research and Development, (*id.* ¶ 46); (4) paying property taxes on $9 million of non-existent, fully-depreciated fixed assets and charging the government for such costs as part of its general indirect costs, (*id.* ¶¶ 47-49); and (5) violating "present responsibility" agreements with the Department of Defense. (*Id.* ¶¶ 56-59.) The relator contends that he apprised management at UTC and Norden of Norden's wrongdoing, but neither company took any action to rectify the situation. (*Id.* ¶¶ 32, 34, 42, 44, 47, 50-59.)

Pursuant to Federal Rule of Civil Procedure 12(b)(1) and the jurisdictional bars in 31 U.S.C. §§ 3730(b)(5) and 3730(e)(3), the defendants move to dismiss Capella's suit on the ground that it involves the same material facts as the *Drake* action--the making of false representations and the filing of false claims in connection with the recovery of indirect costs incurred under government defense contracts from 1987 to 1994. The defendants insist that "[i]t is immaterial" that Drake "focuses on the propriety of Norden's depreciation costs and Capella focuses on insurance costs." (Defs.' Mem. Supp. at 17, 19.) Rather, they maintain that both Capella and Drake allege "that Norden falsely claimed indirect costs in progress bills and in proposals for indirect costs rates, including Certificates of Indirect Costs, and that to get a false claim paid or to decease an obligation to the government, Norden made false statements in its progress bills, proposals for indirect cost rates and Certificates of Indirect Costs, CAS disclosure statements, contracts and reports." (*Id.* at 4.) In addition, the defendants argue that both relators accuse UTC and Norden of conspiring with each other concerning such claims and obligations. (*Id.*)

STANDARD OF REVIEW

A motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) may be raised at any time, and the defense cannot be waived by the parties. *See Moodie v. Federal Reserve Bank of N.Y.,* 58 F.3d 879, 882 (2d Cir.1995). Once challenged, the party asserting subject matter jurisdiction bears the burden of proving its existence. *See McNutt v. General Motors Acceptance Corp. of Ind.,* 298 U.S. 178, 182-83 (1936); *Murphy v. United States,* 45 F.3d 520, 522 (1st Cir.1995); *Robinson v. Overseas Military Sales Corp.,* 21 F.3d 502, 507 (2d Cir.1994). "Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U .S. 375, 377 (1994); *see also Finley v. United States,* 490 U.S. 545, 547-48 (1989). As a result, an action must be dismissed for lack of subject matter jurisdiction when a federal court lacks the constitutional power or statutory authority to adjudicate the case. *See Kokkonen,* 511 U.S. at 377; *Willy v. Coastal Corp .,* 503 U.S. 131, 136-37 (1992); *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541 (1986); *In re Orthopedic "Bone Screw" Prods. Liab. Litig.,* 132 F.3d 152, 155 (3d Cir.1997).

***5** Under Rule 12(b)(1), the standard of review depends on the purpose of the motion. In a facial challenge to the legal sufficiency of the jurisdictional allegations, the Court must accept as true all well-pleaded facts in the complaint and refrain from drawing inferences in favor of the party contesting jurisdiction. *See Rueth v. United States Environmental Protection Agency,* 13 F.3d 227, 229 (7th Cir.1993); *Atlantic Mut. Ins. Co. v. Balfour MacLaine Int'l Ltd.,* 968 F.2d 196, 198 (2d Cir.1992); 2 James W. Moore, *Moore's Federal Practice* § 12.30[4], at 12-38 (3d ed.1997). However, where the defendant attacks the factual basis of jurisdiction, the Court may look beyond the allegations in the complaint, *see Antares Aircraft. L.P. v. Federal Republic of Nig.,* 948 F.2d 90, 96 (2d Cir.1991), *vacated on other grounds,* 505 U.S. 1215 (1992), and also may "consider affidavits, depositions, and testimony." *Gotha v. United States,* 115 F.3d 176, 179 (3d Cir.1997); *see also Aversa v. United States,* 99 F.3d 1200, 1209-10 (1st Cir.1996) .

"Normal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements," both legally and factually. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 537 (1995) (citations omitted). In the alternative, courts may hold an evidentiary hearing to resolve factual disputes, where the plaintiff must establish jurisdiction by a preponderance of the evidence. *See Bell v. Metallurgie Hoboken-Overpelt, S.A.,* 902 F.2d 194, 197 (2d Cir.1990); *K-Lath, Div. of Tree Island Wire (USA), Inc. v. Davis Wire Corp.,* 15 F.Supp.2d 952, 959 (C.D.Cal.1998); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (2d ed.1990). Such a hearing is proper when the "proffered evidence is so conflicting and the record is rife with contradiction, or when a plaintiff's affidavits are 'patently incredible.'" ' *Foster-Miller, Inc. v. Babcock & Wilcox Can.,* 46 F.3d 138, 146 (1st Cir.1995).

DISCUSSION

I. *Qui Tam Provisions of False Claims Act*

The *qui tam* provisions of the FCA empower private persons, known as "relators," to: (1) bring a civil action on behalf of the United States against persons who knowingly submit false or fraudulent claims to the government for payment in violation of 31 U .S.C. § 3129(a); and (2) share in any proceeds ultimately recovered as a result of such suits. *See* 31 U.S.C. §§ 3730(b)- (d); *United States ex rel. S. Prawer & Co. v. Fleet Bank of Me.,* 24 F .3d 320, 324 (1st Cir.1994). Relators must file a *qui tam* action under court seal and supply the government with a copy of the complaint, as well as evidence and information to support the charges. *See* 31 U.S.C. § 3730(b)(2). The FCA gives the Justice Department at least sixty days to review the claims and the defendant is not served a copy of the complaint during this time. *See id.* §§ 3730(b)(2), (3). If the government chooses to intervene in the action, it assumes the role of lead prosecutor. *See id.* §§ 3730(b)(4)(A), (c)(1). Where the government declines to intervene, the relator may serve the complaint on the defendant and proceed with the action, *see id.* §§ 3730(b)(4)(B), (c)(3), and if successful, the relator may receive a "bounty" of between 25% and 30% of the proceeds from the action or settlement. *See id.* § 3730(d)(2).

*6 The FCA's *qui tam* jurisdiction scheme serves two competing purposes. *See Costner v. URS Consultants, Inc.*, 153 F.3d 667, 675 (8th Cir.1998) . On one hand, it seeks to provide "adequate incentives for whistle-blowing insiders with genuinely valuable information" to help uncover frauds perpetrated on the government. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C.Cir.1994). Indeed, the 1986 amendments to the FCA were "designed to encourage more private enforcement suits." S.Rep. No. 99-345, at 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5288-89. In this sense, the FCA encourages whistleblowers to act as "private attorneys general," bringing suits for the common good. *See United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041-42 (6th Cir.1994). On the other hand, the *qui tam* provisions attempt to eliminate "parasitic lawsuits" and "discourage opportunistic plaintiffs who have no significant information to contribute of their own." *Quinn*, 14 F.3d at 649; *see also Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 565 (11th Cir.1994). The FCA's *qui tam* provisions must be analyzed in the context of these twin goals. *See United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 233-34 (3d Cir.1998) (emphasizing the need to preserve a balance between the 1986 amendments' conflicting goals of encouraging whistleblowing, while discouraging parasitic suits); *S. Prawer & Co.*, 24 F.3d at 326; *Quinn*, 14 F.3d at 651; *False Claims Act Implementation; Hearing Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary*, 101st Cong. 3 (1990) (statement of Sen. Grassley). [FN2]

FN2. From the inception of the FCA's *qui tam* provisions in 1863 through the most recent amendments to the Act in 1986, Congress has shifted in its attempt to reconcile these purposes.

II. *31 U.S.C. § 3730(e)(3) Jurisdiction Bar*

31 U.S.C. § 3730(e)(3) provides a jurisdictional bar to the maintenance of a *qui tam* action. It states the following:

> In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the *government is already a party.*

31 U.S.C. § 3730(e)(3) (emphasis added). The plain terms of section 3730(e)(3) require the government to be a party in the prior action in order to trigger the jurisdictional bar. *See, e.g., Costner,* 153 F.3d at 676; *S. Prawer & Co.*, 24 F.3d at 327-28; *United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F.Supp. 292, 302 (D.D.C.1996); *Hyatt v. Northrop Corp.*, No. 87- 6892-KN, 1989 U.S. Dist. LEXIS 18941, at *2 (C.D.Cal. Dec. 27, 1989). Under section 3730(e)(3), "[i]f the government files an action to enforce the FCA, a would-be relator may not later bring any action based on the same underlying facts." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 746 (9th Cir.1993). "[T]his section will typically bar only a *qui tam* action based upon allegations or transactions pleaded by the government...." *Costner,* 153 F.3d at 676 (internal quotations omitted). Because the government declined to formally intervene in the *Drake* action, it is not a party for purposes of section 3730(e)(3).

*7 The defendants nevertheless insist that section 3730(e)(3) bars Capella's suit. As support, they cite *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir.1993) for the proposition that "the Government remains the real party in interest in any [FCA *qui tam*] action," and *United States ex rel. Merena v. SmithKline Beecham Corp.*, Nos. 93-5974 *et al.*, 1997 U.S. Dist. LEXIS 19896, at *48 n. 21 (E.D.Pa. July 21, 1997), *aff'd,* 149 F.3d 227 (3d Cir.1998), where the court suggested in dicta that the government may be a "party" under section 3730(e)(3) without formally intervening in a *qui tam* action. These cases do not convince the Court that the government constitutes a party in the *Drake* action. First, the statement by the Second Circuit in *Kreindler & Kreindler* is taken out of context and does not bear on section 3730(e)(3) because the statute employs the term "party," not the phrase "real party in interest." Second, the factual situation in *Merena,* where the government "investigated, took over primary responsibility for and proceeded with" the earlier filed actions at issue, 1997 U.S. Dist. LEXIS 19896, at *48 n. 21, is not present in this case. The government merely has filed an amicus brief. Therefore, even if the Court agreed with *Merena'* s hypothetical analysis, section 3730(e)(3) would not be triggered.

However, the Court also concludes that the government may not be a "party" pursuant to section 3730(e)(3) unless it brings the prior action itself or formally intervenes. *See Golatte v. Mathews,* 394 F.Supp. 1203, 1207 n. 5 (M.D.Ala.1975) (stating that the term "party" refers to those by or against whom a legal suit is brought; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties); *M & A Elec. Power Coop. v. True,* 480 S.W.2d 310, 314 (Mo.Ct.App.1972) (declaring that "[a] 'party' to an action is a person [or entity] whose name is designated on record as plaintiff or defendant"); *City of Chattanooga v. Swift,* 442 S.W.2d 257, 258 (Tenn.1969) (defining a "party" as one "having a right to control proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from the judgment"); Black's Law Dictionary 1122 (6th ed.1990) (citing the above cases). Congress no doubt was aware: (1) of the common usage of the term "party" as described above; (2) that the government remains the real party in interest in any *qui tam* action; and (3) that the government might play a role in *qui tam* cases without formally intervening. Given this knowledge, it seems unlikely that Congress intended the government to be considered a party without formal intervention. The defendants' argument that the government's filing of amicus curiae briefs in this litigation unfairly claims the advantages of party status without being an actual party should be addressed to the legislature. For these reasons, the Court holds that section 3730(e)(3) does not bar Capella from maintaining this action.

III. *31 U.S.C. § 3730(b)(5) Jurisdiction Bar*

A. Legal Standard

*8 The defendants next assert that 31 U.S.C. § 3730(b)(5) precludes the relator from bringing this suit. This section provides:

> When a person brings an action under this subsection, no person other than the government may intervene or bring a related action based on the facts underlying the pending action.

31 U.S.C. § 3730(b)(5). Section 3730(b)(5) acts as a jurisdictional bar to a *qui tam* action. *See Merena,* 1997 U.S. Dist. LEXIS 19896, at *48 n. 21. The majority of courts acknowledge that section 3730(b)(5) "does not lend itself to a narrow interpretation that bars only 'identical suits' based on 'identical facts." ' [FN3] *Id.* at *53. "A later case need not rest on precisely the same facts as a previous claim to run afoul of the statutory bar." *LaCorte,* 149 F.3d at 232 (rejecting an identical facts test proposed by the plaintiffs). Indeed, section 3730(b)(5) employs the phrase "related action," not an identical one. Moreover, an identical facts test might decrease incentives for relators to report fraud promptly, while encouraging duplicative lawsuits which are unlikely to increase the total recovery. *See id.* at 233- 34.

> FN3. *But see United States ex rel. Dorsey v. Dr. Warren E. Smith Community Mental Health/Mental Retardation and Substance Abuse Ctrs.,* No. 95-7446, 1997 WL 381761, at *4 (E.D. Pa. June 25, 1997) (employing an identical facts test in holding that section 3730(b)(5) bars only subsequently filed identical claims). The Third Circuit's ruling in *LaCorte* appears to overrule this standard.

While most courts have rejected an identical facts test, they have been unable to agree on a precise standard to govern analysis under section 3730(b)(5) . For example, the Third Circuit holds that "if a later filed allegation states all the essential facts of a previously-filed claim, the two are related and section 3730(b)(5) bars the later claim, even if that claim incorporates somewhat different details." *LaCorte,* 149 F.3d at 232-33. In another part of its opinion, the Third Circuit stated that later claims alleging the "same material elements as claims in the original lawsuits" must be barred. *See id.* at 234 n. 6 (affirming the lower court's reasoning in *Merena,* 1997 U.S. Dist. LEXIS 19896, at *54). By contrast, the district court in *Erickson ex rel. United States v. American Inst. of Biological Sciences* adopted a two-prong test under section 3730(b)(5): "[a] subsequently filed *qui tam* suit may continue only to the extent that it is (a) based on facts different from those alleged in the prior suit and (b) gives rise to separate and distinct recovery by the government." 716 F.Supp. 908, 918 (E.D.Va.1989). Still another standard was put forth in *Hyatt v. Northrop Corp.,* where the district court concluded that section 3730(b)(5) barred later claims to the extent they raise "issues which were the subject of the [prior action]." 1989 U.S. Dist. LEXIS 18941, at *2. Perhaps the First Circuit's analysis of section 3730(e)(3) best sums up how courts should approach section 3730(b)(5). [FN4] In *United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine,* the court explained its deceptively simple, yet effective standard:

FN4. Sections 3730(b)(5) and 3730(e)(3) both establish a "first in time" rule; however, it remains unclear the extent that they overlap when the earlier and later filed actions are *qui tam* suits. *Compare* John T. Boese, *Civil False Claims and Qui Tam Actions* § 4, at 84 n. 235 (Supp.1998) (suggesting that section 3730(b)(5) is drafted more narrowly than section 3730(e)(3)) *with Merena,* 1997 U.S. Dist. LEXIS 19896, at *64 (deciding that no practical difference exists between the two provisions); *Hyatt,* 1989 U.S. Dist. LEXIS 18941, at *2 (applying the same test to both sections).

> [W]e think that a court should look first to whether the two cases can properly be viewed as having the qualities of a host-parasite relationship. In answering this question, we think it would be useful for the court to be guided by the definition of the word "parasite," and ask whether the *qui tam* case is receiving "support, advantage, or the like" from the "host" case ... "without giving any useful or proper return" ... (or at least having the potential to do so).

***9** *Id.* at 327-28; *see also Alexander,* 924 F.Supp. at 302. This standard most closely mirrors the policies Congress sought to achieve in section 3730(b)(5).

Although these related standards are worded differently, they contain one common principle--section 3730(b)(5) precludes a subsequent relator's claim that alleges the defendant engaged in the same type of wrongdoing as that claimed in a prior action, even if the allegations cover a different time period or location within a company. *See Cooper,* 19 F.3d at 567; *Merena,* 1997 U.S. Dist. LEXIS 19896, at *53-54; *Hyatt,* 1989 U.S. Dist. LEXIS 18941, at *3-4, 13-14. In light of this principle and the policies underlying the FCA's *qui tam* provisions, the Court concludes that section 3730(b)(5) bars a later claim unless: (1) it alleges a different type of wrongdoing, based on different material facts than those alleged in the earlier suit; and (2) it gives rise to a separate recovery of actual damages by the government. In applying this standard, the Court asks whether the earlier and later actions possess the typical qualities of a parasitic relationship, such that the subsequent suit receives support or advantage without offering any useful or proper return.

B. Application of the Standard

Having determined the proper interpretation of section 3730(b)(5), the Court must compare Capella's claims with Drake's claims to determine whether they survive the statutory bar. This may be accomplished "simply by comparing the original and later complaints." *LaCorte,* 149 F.3d at 234 n. 6. This comparison reveals that two different types of fraudulent schemes lie at the heart of *Capella* and *Drake.* On one hand, Capella contends that the defendants made false statements and claims to recover unallowable insurance costs from the government. On the other hand, Drake alleges that the defendants made false statements and claims to recoup unallowable depreciation costs on fixed assets from the government.

1. Insurance Costs

The FCA imposes liability on any person who "knowingly presents" to the government a "false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1), or who "knowingly makes ... a false record" in order to have "a false or fraudulent claim paid or approved by the [g]overnment." 31 U.S.C. § 3729(a)(2). Clearly, section 3729(a) requires plaintiffs to show that the claim or record made to get a claim paid was false or fraudulent. *See, e.g., United States ex rel. Hopper v. Anton,* 91 F.3d 1261, 1266 (9th Cir.1996) ("[w]hat constitutes the FCA offense is the knowing presentation of a claim that is either fraudulent or false"), *cert. denied,* 519 U.S. 1115 (1997); *United States v. Rivera,* 55 F.3d 703, 706 (1st Cir.1995);

Blusal Meats, Inc. v. United States, 638 F.Supp. 824, 827 (S.D.N.Y.1986), *aff'd,* 817 F.2d 1007 (2d Cir.1987). Capella and Drake must prove different material facts in order to establish the "falsity" element of the FCA violations alleged in their respective complaints. Capella must show that the defendants provided false certifications to the government regarding the costs of self-insurance and captive insurance programs. In contrast, Drake must demonstrate that the defendants made false certifications to conceal a write-off of fixed assets and to receive payment for depreciation costs on non-existent or non-depreciable assets.

***10** This case compares favorably to those situations where courts allowed claims to proceed in the face of a section 3730(b)(5) challenge. *See Merena,* 1997 U.S. Dist. LEXIS 19896, at *40-41 (holding that claims in second suit regarding fraud in urinalysis testing were not barred by claims in first suit concerning fraud in blood testing); *Dorsey,* 1997 WL 381761, at * 2 (concluding that the subsequent relator's claim that the defendant unnecessarily "refer[red] patients to therapy" to obtain reimbursement was not barred by the first suit's allegations that the defendant improperly received reimbursement for estimated, rather than actual, expenses and for $350,000 paid to a consulting agency which had not provided any services); *Erickson,* 716 F.Supp. at 918 (deciding that allegations in prior *qui tam* action alleging improper payments of salaries and bonuses did not bar that portion of the subsequent suit alleging improper use of government funds to pay for personal entertainment).

In addition, Capella's suit is not receiving support, advantage, or the like from Drake's suit without providing any useful or proper return. The allegations accusing the defendants of false billing depreciation costs on fixed assets in *Drake* did not put the government on notice that the defendants falsely billed insurance costs, as alleged in *Capella.* As a result, the government has a chance to uncover potential fraud and to recover additional actual damages. Furthermore, some evidence of wrongdoing might be uncovered in Capella's case that could prove useful in Drake's case. Consequently, this action does not possess the typical qualities of a parasitic lawsuit.

The defendants contend that the gravamen of *Capella* and *Drake* is the same because each *qui tam* plaintiff alleges that the defendants submitted false claims for "indirect costs" for the same time period. This argument has its genesis in the manner that UTC and Norden bill the government for indirect costs. Rather than charging the government for depreciation costs and insurance costs in separate bills or as distinct line items in the same bill, the defendants negotiate indirect cost rates with the government. Pursuant to these rates, all indirect costs are accumulated in the same or similar indirect cost pools. In essence, the defendants argue that their submissions of false claims for pooled indirect costs (progress bills and Certificates of Indirect Costs) and statements made to get such claims paid (CAS disclosure statements, contract certifications, and reports) constitute the material facts underlying an FCA violation, despite the fact that those documents contain two kinds of fraud. Because Drake was the first relator to sue based on these submissions, the defendants claim that Capella's allegations merely duplicate the material elements of Drake's suit.

This argument falls short because Capella and Drake must prove fundamentally different facts in order to establish the falsity element of an FCA violation. This element must be established regardless of whether statutory penalties or actual damages are sought. Thus, the falsity of a claim or record constitutes an essential element of a FCA violation. Although Capella and Drake make similar factual allegations concerning the accumulation and presentment of false claims to the government, they have alleged and eventually must prove distinct sets of facts to show that such claims were false or fraudulent. UTC's and Norden's characterization of insurance costs and depreciation costs as indirect costs and practice of submitting one invoice for these costs does not change this reality.

***11** Furthermore, these practices do not prohibit the government from recovering actual damages for two distinct fraudulent schemes. If the plaintiff proves that the defendant violated the FCA, two types of remedies may be recovered: (1) civil penalties between $5,000 and $10,000 for each false claim submitted to the government; and (2) up to three times the amount of actual damages. *See* 31 U.S.C. § 3729(a). Where *statutory penalties* are at issue, defendants are liable for only one penalty on each false claim for payment or false statement in support of such a claim, even if those submissions contain multiple falsehoods. *See, e.g., United States v. Bornstein,* 423 U.S. 303, 308-13 (1976) (holding a subcontractor liable for three statutory penalties where three separately invoiced shipments were made to the prime contractor, even though the prime contractor subsequently submitted thirty-five invoices to the government); *United States v. Krizek,* 111 F.3d 934, 938-40 (D.C.Cir.1997) (remanding for a proper determination of the amount of statutory penalties); *Miller v. United States,* 550 F.2d 17, 24 (Ct.Cl.1977) (assessing five statutory penalties where the defendant had submitted five monthly billings, even though eleven invoices were enclosed in each billing); *United States v. Woodbury,* 359 F.2d 370, 378 (9th Cir.1966) (imposing ten civil penalties on ten false applications for payment); *United States v. Grannis,* 172 F.2d 507, 515 (4th Cir.1949) (assessing ten statutory penalties against a defendant for each of ten fraudulent vouchers, even though the vouchers listed 130 items).

The submission of a claim for payment, however, does not immunize a defendant from paying *actual damages* for two distinct types of fraud billed on one invoice. *See Merena,* 1997 U.S. Dist. LEXIS 19896, at *40-41 (holding that claims in second suit regarding fraud in urinalysis testing were not barred by claims in first suit concerning fraud in blood testing, even though these charges likely were included in the same bills). Given the relators' allegations of two kinds of fraudulent schemes, the government would be entitled to two separate and distinct recoveries for actual damages incurred as a result of the defendants' conduct. The measure of actual damages in *Capella,* if proven, is the dollar amount of unallowable self-insurance and captive insurance costs paid to the defendants pursuant to defense contracts. In contrast, the measure of actual damages in *Drake,* if proven, is the dollar amount of depreciation wrongfully charged on fixed assets that were unaccounted for or written off, as well as the local property taxes paid by Norden on its fully depreciated assets.

"Clearly, the 1986 amendments [to the FCA], insofar as they were responding to a regime in which the preclusion of opportunistic litigation was too heavily weighted, had as perhaps their central purpose an expansion of opportunities and incentives for private citizens with knowledge of fraud against the government to come forward with that information." *S. Prawer & Co.,* 24 F.3d at 327 (citing S.Rep. No. 345, at 1-2, *reprinted in* 1986 U.S.C.C.A.N. at 5266-67); *see also generally False Claims Reform Act: Hearing Before the Subcomm. On Admin. Practice and Procedure of the Senate Comm. on the Judiciary,* 99th Cong. (1985). The defendants' argument stretches section 3730(b)(5)'s goal of prohibiting parasitic suits too far, while contravening the equally important goal of encouraging private citizens to aid the government in uncovering fraud. Under their position, the defendants would be forever immunized from liability for actual damages based on the same invoices at issue in *Drake,* regardless of the disparity of conduct complained of in a later suit. Congress did not intend for section 3730(b)(5) to produce such a result. Accordingly, the Court holds that section 3730(b)(5) does not bar Capella's action to the extent it asserts claims for fraud involving insurance costs.

2. Depreciation Costs

***12** In paragraphs 21 and 22 of his Second Amended Complaint, Capella pleaded allegations concerning improper depreciation costs with respect to progress bills and Disclosure Statements (Second Am. Compl. ¶¶ 21-22.) Because these allegations are identical to the allegations made by Drake in paragraphs 23 and 24 of his complaint, the Court dismisses them pursuant to section 3730(b)(5).

CONCLUSION

For the previous reasons, the defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and 31 U.S.C. §§ 3730(b)(5) and 3730(e)(3) [Doc. No. 59] is granted in part and denied in part. Capella may maintain this *qui tam* action with the exception that the allegations in paragraphs 21 and 22 of the Second Amended Complaint, which seek to recover for the defendants' submission of false claims and the making of false statements in connection with payments by the government for fixed asset depreciation costs, are barred under section 3730(b)(5).

SO ORDERED.

1999 WL 464536 (D.Conn.)